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No. 96-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

R. R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

LAWRENCE H. FUCHS,
Executive Director of the Department of Revenue
of the State of Florida, and
DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, First District of Florida

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* PRINTING INDUSTRIES OF AMERICA AND PRINTING ASSOCIATION OF FLORIDA, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

COME NOW Printing Industries of America ("PIA") and the Printing Association of Florida, Inc. ("PAF"), and move the Court for leave to appear as *amici curiae* in support of the Petitioner, R.R. Donnelley & Sons Company ("Donnelley"), and in support of this motion state as follows:

1. Donnelley has consented in writing to the filing of an *amicus* brief by PIA and PAF, and Donnelley's consent has been filed with the Clerk of this Court.

2. Respondents, Lawrence H. Fuchs and the Department of Revenue of the State of Florida (together, the "Department"), will neither consent nor object to the

filing of this *amicus* brief. Rather, the Department has stated its intent to stand mute about the filing of the *amicus* brief.

3. PIA and PAF are large associations of printers nationwide and in the state of Florida, respectively. PIA and PAF seek to advance their members' interests, including their members' interests in remaining free from unlawful government infringement on the press, whether by taxation as in this case, or otherwise. PIA and PAF bring to the Court a broader spectrum of the printing industry than is represented by Donnelley alone.

4. The Florida tax statute at issue is particularly insidious because it provides states a simple means to circumvent the First Amendment and tax the press selectively, by merely adding a small token group to be taxed along with the press. The membership of PIA nationwide, and of PAF statewide, will be affected adversely if the Florida model is adopted in other states.

5. Because Donnelley has consented to this appearance by *amici*, and the Department has not objected to it, and because of the broad range of interests that PIA and PAF represent, PIA and PAF respectfully request leave to be heard on the issues presented in this case.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* PRINTING INDUSTRIES OF AMERICA AND PRINTING ASSOCIATION OF FLORIDA, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici curiae Printing Industries of America ("PIA"), and Printing Association of Florida, Inc. ("PAF"), urge the Court to grant the Petition for a Writ of Certiorari filed by Petitioner, R.R. Donnelley & Sons Company ("Donnelley").[1] The Court should review this case because the

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[1] Donnelley has consented in writing to the filing of this *amicus* brief, and Donnelley's consent has been filed with the Clerk of this Court. Respondents, Lawrence H. Fuchs and the Department of Revenue, State of Florida (together, the "Department"), neither

Florida court of last resort has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and of another state court of last resort. The Florida court's decision approved a statutory tax scheme that, as applied, singled out printers and publishers for the payment of a sales and use tax on manufacturing equipment for new or expanding operations.

Amicus PIA is the world's largest graphic arts trade association, representing an industry with more than 990,000 employees and $116.3 billion in sales annually. PIA promotes the interests of nearly 14,000 member companies, which are members of one of 33 regional affiliate organizations throughout the United States and Canada. Many of PIA's members are commercial printers, allied graphic arts firms such as electronic imaging companies, equipment manufacturers, and suppliers. PIA promotes programs, services, and a business environment that help its members to operate profitably. It concentrates in the areas of government, industry research and statistical information, management education and publication, and technology information and assistance.

Amicus PAF is a not-for-profit association of more than 500 graphic arts companies in the state of Florida, including those actively engaged in the production of printing, and companies and individuals that furnish related materials, equipment, or services. PAF's members are also members of PIA. PAF provides programs, information, and services to positively impact the professional growth and profitability of its members. PAF's mission is to proactively seek out the proprietary information needs of the Florida graphic arts industry and respond with differentiated educational, regulatory, and legislative programs that demonstrably add value to its members and build synergy within the association.

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consent nor object to the filing of this brief. Accordingly, this brief is accompanied by a motion for leave to appear.

Statistics maintained by PIA reveal that commercial printing is the third largest manufacturing industry in the United States, and the largest industry in the state of Florida, with $86 million in graphic arts equipment and product produced in Florida in 1995. In 1995, Florida's graphic arts industry employed 75,000 people with an annual payroll of $2.1 billion and an average per capita salary of over $28,000 a year. Over 5,500 Florida graphic arts firms produced $8.8 billion in sales in 1995, continuing a trend of eight percent annual market growth since 1992.

PIA and PAF represent hundreds of businesses and individuals who are undoubtedly members of the press, and undoubtedly entitled to the protections of the First Amendment:

> The first amendment rights to freedom of speech and press exist not only because the authors of the Bill of Rights wished to humor the eccentricities of the man on the soap box but because they wished to secure forever the means of making the United States a free market place of ideas. *The human voice and the human pen are vital to this goal but no more vital than the physical printing press itself and the persons who operate it.* . . . Printing and publication may not rest on as strong an individual support as speech and authorship, but because without question printing and publication advance the rights of the people to know and understand they are not less deserving of protection than speech and authorship.
>
> * * * *
>
> [T]he ideal of free men governed by free men is just as dependent upon the vehicle of free speech—a free press. Not just the freedom to write one's own tract, print it in one's basement, and distribute it on the street corner is at stake but the freedom to go to a printer in the business of printing what comes over the counter, pay him, and have printed one's tract is at stake. The purpose of the first amendment was to

> protect the person who only operates the press as much as the author-printer, not so much because otherwise the commercial printer might lose money but because without the printer many an author could not disseminate his ideas. *Unless the mere printer has a right which is greater than that of the ordinary businessman, not only his self-interest will be harmed but the purpose of the first amendment will be defeated.*

Printing Indus. of the Gulf Coast v. Hill, 382 F. Supp. 801, 805, 806 (S.D. Tex. 1974) (emphasis added), *vacated on other grounds*, 422 U.S. 937 (1975). *See also, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) ("[T]he Framers . . . employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published a writer's pamphlets for a fee.") (Thomas, J., concurring). *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (publishers entitled to First Amendment protections as members of the press); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same).

The printing and publishing industries cannot maintain their unique role in American society as the historical and continuing heart of the press, the voice of the people; and cannot maintain their economic stability and growth, if they are singled out for payment of a tax on one of their most expensive capital investments. The Florida sales and use tax statute required Petitioner Donnelley to pay nearly two million dollars more than a member of another industry would have paid for a similar capital equipment purchase. Such disparate treatment violates the First Amendment's guarantee that the law will afford the press the same treatment as similarly situated persons, and that the press will be free from any government infringement that is based on less than a compelling justification.

SUMMARY OF THE ARGUMENT

This Court should review the Florida court's decision because that decision conflicts with governing principles of constitutional law that this Court has established. Florida's selective denial of the sales and use tax exemption allows the state to accomplish indirectly what it could not accomplish directly: differential tax treatment of the press. The Florida court was too literal in holding that the state's denying one other group the exemption was sufficient to avoid a finding that the press was singled out. The classification of printers and publishers with restaurants is illogical and irrational both because these two groups have no relevant common characteristics, and because printers and publishers have much in common with other manufacturers but are treated differently. Thus, the coupling of printers and publishers with restaurants is insufficient to pass constitutional muster. The Court should review this case to resolve its conflict with controlling precedent of this Court.

ARGUMENT

The Florida tax statute at issue excepted printers and publishers from a sales and use tax exemption otherwise available to purchasers of capital equipment for new or expanding businesses. Fla. Stat. Ann. §§ 212.05(1)(a), (b); 212.08(5)(b)1-2,5 (1990).[2] Although the statute on its face listed several other categories of businesses not entitled to the sales and use tax exemption, Respondent Department of Revenue of the state of Florida ("Department") admitted that the businesses in all but one of these other categories were ineligible for the exemption for other reasons, either because they did not produce tangible

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[2] The statute was amended in 1996 to remove printers from the exception, leaving publishers as the only media group excepted from this exemption. The amended statute applies prospectively only, and therefore the 1996 amendment does not render this case moot or otherwise affect it. Fla. Stat. Ann. § 212.08(5)(b)5 (1996).

personal property, or because they had available to them a separate statutory exemption. Thus, these other categories of businesses were, without dispute, unaffected by their inclusion within the exception.

The Department admitted that the only other businesses listed in the exception and affected by it were restaurants, members of a non-manufacuring service industry. The Department further admitted that printers and publishers were the only manufacturers in Florida not entitled to the sales and use tax exemption. The Department offered no justification for this treatment of printers and publishers alone among manufacturers, arguing instead that because restaurants could qualify for the exemption but were also denied it, the press was not singled out for denial of a tax benefit. The Florida court adopted this reasoning, and in so doing violated this Court's precedents.

The Court should review this case to protect the press from states' continuing attempts to fashion creative means of circumventing the First Amendment. States have tried and failed to tax the press directly as in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); to tax its paper and ink as in *Minneapolis Star*; and to tax only part of the press as in *Arkansas Writers' Project*. The Florida statute at issue is a new twist on an old theme: even though on its face it lists other groups, its only significant impact is on the press. The Florida statute's inclusion of an unrelated business having only a minimal tax effect is a mere artifice, a token compliance with a literal interpretation of the First Amendment. To approve the artifice is to encourage continuing governmental inroads on freedom of the press. Whether motivated by anti-press animus or by "the persistent search for new subjects of taxation," *Grosjean*, 297 U.S. at 250, states will continue to target the printing and publishing industries for selective taxation as Florida did—unless this Court stops them.

I. SELECTIVE DENIAL OF AN EXEMPTION CAN, AND IN THIS CASE DOES, VIOLATE THE FIRST AMENDMENT.

The Florida court noted in passing the decisions of this Court and of a sister state court holding that the denial of an exemption can violate the First Amendment:

> In *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991), the Court recognized that the denial of an exemption to a tax of general applicability may also result in a violation of the First Amendment if it singles out the press. *See also Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), holding that a denial of a tax exemption may result in a First Amendment violation.

R.R. Donnelley & Sons Co. v. Fuchs, 670 So. 2d 113 (Fla. 1st DCA), *rev. denied*, 677 So. 2d 841 (Fla. 1996). Despite thus acknowledging that excluding the press from a tax exemption can give rise to a First Amendment claim, the Florida court failed to heed this Court's warning that the danger of selective exemption is that it can enable a state to accomplish indirectly what it cannot accomplish directly:

> [Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.' Such interference with constitutional rights is impermissible. We have applied this general principle to denials of tax exemptions.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citations omitted). Florida clearly could not permissibly im-

pose a special tax on the press, but it produced the same result indirectly through a selective exemption not extended to the press. The Court has never limited its denial-of-exemption precedents to cases in which literally only the press is denied the exemption, but rather has required "careful analysis of the particular circumstances" at issue to determine whether the effect of the denial inappropriately impacts the press. *Speiser*, 357 U.S. at 521. The "particular circumstances" of this case are compelling: the exemption at issue has no substantial impact on any group except the print media. Florida's denial of the tax exemption to printers and publishers amounts to an indirect singling out of the press that cannot withstand First Amendment scrutiny regardless of the fact that one other token group is denied the exemption.

II. DENYING ONE OTHER TOKEN GROUP THE EXEMPTION CANNOT SAVE THE TAX.

Taxing the press plus one other *de minimus* group—from another industry—cannot save the statute. The Court noted in *Minneapolis Star* that if exemption from a statute is the rule and not just an "isolated exception," the press is entitled to be treated in accordance with the rule and not the exception. *Minneapolis Star*, 460 U.S. at 583 n.5 (interpreting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946)). Florida's sales and use tax exemption is very broad, including all other manufacturing industries, and thus is "the rule," notwithstanding the presence of a single isolated exception, restaurants, in addition to printers and publishers. The press has the right to be treated in accordance with the rule, not the isolated exception. If the law were otherwise, states could readily circumvent the First Amendment by taxing the press plus one other group selected at random (or selected for its lack of lobbying power or current unpopularity). This would produce the same kind of indirect violation of the First Amendment that the Court has said it will not tolerate. *Perry*, 408 U.S. at 597.

III. THE PRINTING AND PUBLISHING INDUSTRIES HAVE THE RIGHT TO BE TREATED THE SAME AS OTHER MANUFACTURERS.

Florida's coupling of printers and publishers with restaurants is insufficient to avoid a finding of impermissible singling out of the press, because the two groups are not the same in relevant respects. The First Amendment requires rational classifications, and Florida cannot rely upon an irrational linkage of printers and publishers with restaurants to avoid constitutional scrutiny. The constitution requires that printers and publishers be treated the same as other businesses with reasonable similarities. *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (state cannot "treat differently persons who are in all relevant respects alike"); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 344 (1989) (tax classifications cannot be arbitrary or capricious); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (real differences in character or nature are required to justify disparate treatment); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (illusory distinctions will not support tax classifications).

Printers and publishers are like other manufacturers in important business respects, and are unlike restaurants in nearly all relevant respects. As a practical matter, for instance, printers' and publishers' purchases of capital equipment are very similar in scale and purpose to purchases by other industrial manufacturers, and not even remotely comparable to restaurants' purchases of capital equipment. Donnelley's purchases cost over $30 million dollars; such an investment in capital equipment for a restaurant is unimaginable. The stark contrast between the nature of the tangible personal property produced by the two types of entities—the printed word versus prepared food—also underscores the First Amendment implications of the statute. These considerations illustrate that Florida's linkage of printers and publishers with restaurants is no more rational than is its refusal to link printers

and publishers with other manufacturers. Thus, excepting restaurants from the sales and use tax exemption, and taxing the press while exempting other manufacturers, do not satisfy the First Amendment.

IV. THE STATE HAS FAILED TO ARTICULATE ANY RATIONAL BASIS FOR ITS DISCRIMINATORY TAX SCHEME.

The Florida court merely speculated about what state interest might have prompted Florida to tax printers and publishers while creating a tax incentive to encourage all other manufacturers to enter the state or expand existing operations. The court's primary theory was that Florida might have decided to disfavor automation because it did not "offer[] special advantages or benefits to Florida such as job creation . . . ." The court failed to appreciate that the same argument could readily apply to many, if not all, manufacturers purchasing expensive capital equipment. Yet the state clearly has not imposed a sales and use tax burden on these other manufacturers as a penalty for increasing automation.[3] Florida's classification of printers and publishers separately from other manufacturers is irrational.

The Florida court's second speculative rationale, that the state may have wanted to treat all members of the media the same, is equally insupportable. This Court need look no further than the *Magazine Publishers* litigation to see that even during the time period in question here, Florida openly discriminated between different members of the media. *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459, 463 (Fla. 1992) (on remand from *Miami Herald Pub. Co. v. Department of Revenue*, 499 U.S. 972 (1991), finding unconstitutional Florida's disparate treatment of magazines and

[3] Ironically, the undisputed evidence below was that the equipment purchases at issue required Donnelley to hire additional personnel, not less.

newspapers). The fact is, Florida has not advanced *any* rationale for the tax, and the only two theories the Department or the Florida court could conjure up are contrary to the undisputed evidence. This pretense must end.

CONCLUSION

The Court should exercise its jurisdiction to review this case in order to remedy Florida's impermissible infringement of printers' and publishers' First Amendment rights, and order Florida to refund the sales and use taxes that printers and publishers paid under the state's discriminatory tax scheme.

Respectfully submitted,

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